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IN SUPREME COURT, STATE OF MINNESOTA, 1940

No. 32813

H. H. IRVINE,

Appellant,

vs.

G. HOWARD SPAETH, COMMISSIONER OF TAXATION OF MINNESOTA,

Respondent.

STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MINNESOTA.

Now comes H. H. Irvine, by his counsel of record, and respectfully shows:

1. The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to review on appeal the judgment of the Supreme Court of the State of Minnesota:

Section 237 of the Judicial Code, as amended, U. S. C. Title 28, Section 344, providing:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the

United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon an appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

2. The statute of the State of Minnesota, the validity of which is involved:

Mason's Minnesota Statutes, 1938 Supplement, Section 2394, the pertinent provisions of which are as follows:

"2394-3. *Classes of taxpayers.*—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

* * * * * * *

"(b) Resident and non-resident individuals, except that no nonresident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

* * * * * * *."

"2394-10. *What is net income.*—The term 'net income' shall mean the gross income as defined in Sections 11 and 12, less the deductions allowed by Section 13."

"2394-11. *What is gross income.*—The term 'gross income' shall include every kind of compensation for labor or personal services of every kind from any private or public employment, office, position or services, whatsoever; income derived from the ownership

or use of property; gains or profits derived from every kind of disposition of, or every kind of dealings in, property; income derived from the transaction of any trade or business; and income derived from any source whatever. Items of gross income includible within said definitions shall be deemed such regardless of the form in which received. Items of gross income shall be included in gross income of the taxable year in which received by a taxpayer unless properly to be accounted for as of a different taxable year under methods of accounting permitted by Section 9, except that (1) amounts transferred from a reserve or other account, if in effect transfers to surplus, shall, to the extent that such amounts were accumulated through deductions from gross income during any taxable year, be treated as gross income for the year in which the transfer occurs, and (2) amounts received as refunds on account of taxes deducted from gross income during any taxable year shall be treated as gross income for the year in which actually received."

"2394-12. *Exemptions from gross income.*—The following items shall not be included in gross income:

* * * * * * *

"(f) Interest upon obligations of the State of Minnesota, any of its political or governmental subdivisions, any of its municipalities, or any of its governmental agencies or instrumentalities.

"(g) Income received from the United States, its possessions, its agencies, or its instrumentalities, so far as immune from state taxation under federal law."

"2394-21. *What are dividends.*—(a) The term 'dividends' shall mean any distribution made by a corporation to its shareholders, whether in money or in other property, out of its accumulated earnings or profits. Every distribution shall be treated as made out of earnings or profits if, and to the extent that, any such earnings or profits are available on the date the action ordering such distribution was taken or, if no such

action was taken, on the date of the actual payment or credit of such distribution to shareholders, and, for the purposes hereof, the earnings or profits for the year during which any such distribution was so made shall be prorated on the time basis. Dividends paid in property other than cash shall be included in the recipient's income at the fair market value of such property on the date the action ordering their distribution was taken, or if no such action was taken, on the date of the actual payment or credit thereof to the shareholder."

"2394-22. Taxable net income shall mean the net income assignable to this state, and shall be determined as provided in Sections 23, 24, 25, and 26."

"2394-23. Items of gross income shall be assigned to this state or other states or countries in accordance with the following principles:

* * * * * * *

"(b) * * * Income or gains from intangible personal property not employed in the business of the recipient of such income or gains, and from intangible personal property employed in the business of such recipient if such business consists principally of the holdings of such property and the collection of the income and gains therefrom, wherever held and whether in trust or otherwise, shall be assigned to this state if the recipient thereof is domiciled within this state; * * *."

"2394-48—*Tax a personal debt.*—(a) The tax imposed by this Act, and interest and penalties imposed with respect thereto, shall become a personal debt of the taxpayer from the time the liability therefor arises, irrespective of when the time for discharging such liability by payment occurs. The debt shall, in the case of the executor or administrator of the estate of a decedent and in the case of any fiduciary, be that of

such person in his official or fiduciary capacity only unless he shall have voluntarily distributed the assets held in such capacity without reserving sufficient assets to pay such tax, interest and penalties, in which event he shall be personally liable for any deficiency. This provision shall apply only to cases in which this state is legally competent to impose such personal liability.

"(b) The tax imposed by this Act, and interest and penalties imposed with respect thereto, shall become a lien upon all of the real property of the taxpayer within this state, except his homestead, from and after the filing by the Commission of a notice of such lien in the office of the register of deeds of the county in which such real property is situate."

3. The date of the judgment sought to be reviewed: July 1, 1941.

4. The date upon which the application for appeal is presented: August 19, 1941.

5. The nature of the case:

The case is a controversy respecting the validity of Minnesota State income taxes arising out of the inclusion in Appellant's 1937 gross income for State income tax purposes of dividends paid by First Bank Stock Corporation on shares of said corporation owned by appellant out of dividends received by First Bank Stock Corporation from national banking associations situated in Minnesota, North Dakota, South Dakota, and Montana, the shares of which were owned by First Bank Stock Corporation and had been subjected to the *ad valorem* tax on shares imposed by the laws of said States for the year 1937, the tax on said national banking association shares being the first method of taxation authorized by Revised Statutes of the United States, Section 5219, as amended (12 U. S. C. A., Sec. 548).

6. The court rulings bringing the case within the jurisdictional provision relied upon, namely, Section 237 of the Judicial Code (U. S. C. Title 28, Sec. 344):

(a) Trial. Plaintiff's (Appellant's) complaint in the action instituted by him in the District Court of Ramsey County, Minnesota, for the recovery of said taxes brought pursuant to the provisions of Section 2394-47 Mason's Minnesota Statutes, 1938 Supplement, alleged that the imposition of a tax on the portion of the dividends received by him during the calendar year 1937 on his shares of First Bank Stock Corporation which were paid out of dividends received by First Bank Stock Corporation on shares of national banking associations owned by First Bank Stock Corporation constituted the imposition of a tax upon and measured by the income of national banks in violation of Section 5219 of the Revised Statutes of the United States (Par. VI of said complaint, Rec. 4). The amended answer of the defendant (appellee), Commissioner of Taxation of the State of Minnesota, constitutes a denial of said allegation (R. 10). The trial court made conclusions of law that the entire amount of dividends paid by First Bank Stock Corporation to the plaintiff (appellant) during 1937 were properly included in gross income of the plaintiff (appellant) under the provisions of Chapter 405, Laws of 1933, as amended, viz., Sections 2394-1 to 2394-59, inclusive, Mason's Minnesota Statutes, 1938 Supplement; that plaintiff (appellant) was not entitled to any refund of income taxes paid for the year 1937; and that defendant (appellee) was entitled to judgment that the plaintiff (appellant) take nothing by the action and for costs and disbursements. An order that judgment be entered accordingly was issued (R. 32-33).

(b) The judgment of the trial court: Pursuant to said order for judgment the District Court of Ramsey County,

Minnesota, entered judgment in favor of defendant (appellee) and against plaintiff (appellant) that plaintiff (appellant) recover nothing by his action, that plaintiff (appellant) was not entitled to any refund of income taxes paid for the year 1937 and that defendant (appellee) recover his costs and disbursements in said action. Said judgment was signed December 14, 1940 (R. 33).

(c) The appeal from the judgment. Appellant took an appeal from said judgment to the Supreme Court of the State of Minnesota, said court being the court of last resort of the State of Minnesota in such cases and on June 20, 1941, said Supreme Court of the State of Minnesota issued an opinion affirming said judgment. Judgment was entered in said Supreme Court of the State of Minnesota on July 1, 1941. The Supreme Court of the State of Minnesota, in affirming said judgment of the District Court of Ramsey County, Minnesota, found that the application of the Minnesota statute, *supra,* was valid and in the course of its opinion, copy of which is hereto attached and hereby made a part hereof, stated specifically:

> "This action involves the tax on part of plaintiff's income for the year 1937. Included in his return was the amount of all dividends received from the First Bank Stock Corporation. His present claim is that, so far as those dividends passed on to him income from dividends declared by national banks, they were exempt from state income tax.
>
> "Plaintiff's case is based on R. S. Sec. 5219, as amended, 12 U. S. C. A. Sec. 548, which in part reads:
>
> " 'The several States may (1) tax said shares (of national banking associations), or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net

income, provided the following conditions are complied with:'

"As federal instrumentalities, national banks are subject to no inherent power in the states to tax them. The banks, their property, and shares of their capital stock are subject to state taxation only as congress permits. Des Moines National Bank *v.* Fairweather, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, and cases cited. A tax beyond that permission is void. Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850.

"The congressional permission is in Section 5219. As the first of the 'following conditions' referred to in the above quotation therefrom, it declares that 'The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.' Minnesota did not, in 1937, tax national banks 'according to or measured by their net income.' Instead, it taxed their shares. 1 Mason Minn. St. 1927, Sec. 2026-1 to 4. Under 3 Mason Minn. St. 1940 Supp. Sec. 2394-5 (a) national and state banks are exempt from operation of the state income tax.

"Thus the question is whether the tax in question is an 'other' tax on the 'shares of national banking associations.' Plaintiff's contention is that 'because Minnesota cannot impose a tax on dividends paid by national banks it cannot impose a tax on dividends paid by First Bank Stock Corporation out of national bank dividends.' That, in sum, is the case for plaintiff. We deny it for these reasons."

There is thus involved the final judgment of the highest court of the State of Minnesota in which a decision in the suit could be had where is drawn in question the validity of a statute of that State on the ground that it violates Revised Statutes of the United States, Section 5219 as amended (12 U. S. C. A., Sec. 548); the decision was in favor of the

statute's validity. The requirements of Section 237 of the Judicial Code (U. S. C. Title 28, Section 344) *supra*, it is submitted, are satisfied.

First National Bank v. *Anderson* (1926) 269 U. S. 341;
First Bank Stock Corporation v. *Minnesota* (1937) 301 U. S. 234;
Dickinson v. *Stiles* (1918) 246 U. S. 631.

The question involved is substantial because the Minnesota statute as applied is repugnant to Revised Statutes of the United States, Section 5219 as amended (12 U. S. C. A. 548), in that the States of Minnesota, North Dakota, South Dakota, and Montana, in which are situated the national banking associations the shares of which were owned by First Bank Stock Corporation in 1937, all had elected to tax and had taxed the shares of such associations *ad valorem* and the imposition by Minnesota of a tax on the dividends of First Bank Stock Corporation paid out of dividends of such national banking associations constitutes the imposition of a congressionally forbidden tax on shareholders resident in Minnesota. *Bank of California* v. *Richardson*, 248 U. S. 476, 483. *Schuylkill Trust Company* v. *Pennsylvania*, 296 U. S. 113. *Schuylkill Trust Company* v. *Pennsylvania*, 302 U. S. 506.

Respectfully submitted,

FLETCHER, DORSEY, BARKER, COLMAN & BARBER,
LELAND W. SCOTT,
Attorneys for Appellant.

EXHIBIT "A".

RAMSEY COUNTY.

No. 115. Stone, J.

32813.

H. H. IRVINE, *Appellant*,

vs.

G. HOWARD SPAETH, Commissioner of Taxation of Minnesota, *Respondent.*

Endorsed: Filed June 20, 1941. Grace Kaercher Davis, Clerk Minn. Supreme Court.

Syllabus.

The First Bank Stock Corporation is a holding company, as such, through ownership of their stock, managing and operating a system of "chain banks." Some of the latter are national banks. The qualified immunity of such national banks from state taxation does not follow dividends on their shares through the First Bank Stock Corporation, so that dividends paid by it to residents of this state are, by so much as they pass on dividends of national banks, immune from the state income tax. The First Bank Stock Corporation is a "non-conductor" of such immunity.

Affirmed.

Opinion.

STONE, *Justice:*

In this action to recover an alleged overpayment of state income tax, plaintiff, a resident and citizen of the state, claims that a portion of the dividends received by him as stockholder in First Bank Stock Corporation is exempt.

First Bank Stock Corporation is a Delaware corporation, qualified to transact business in this state under local

statutes. It is a holding company, colloquially characterized as the owner of a system of "chain banks." It owns from 80 to 98 per cent of the stock of 32 state and national banks situated in Minnesota, North and South Dakota, and Montana. (It owns 63.84 per cent of the stock in a thirty-third bank.)

The nature of its business, local and otherwise, is fully stated in State *v.* First Bank Stock Corporation, 197 Minn. 544, 267 N. W. 519, 269 N. W. 37, affirmed, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228. Therein the corporation was held subject to local taxation in respect to its stocks of banks chartered in other states.

This action involves the tax on part of plaintiff's income for the year 1937. Included in his return was the amount of all dividends received from the First Bank Stock Corporation. His present claim is that, so far as those dividends passed on to him income from dividends declared by national banks, they were exempt from state income tax.

Plaintiff's case is based on R. S. Sec. 5219, as amended, 12 U. S. C. A. Sec. 548, which in part reads:

"The several States may (1) tax said shares (of national banking associations), or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:"

As federal instrumentalities, national banks are subject to no inherent power in the states to tax them. The banks, their property, and shares of their capital stock are subject to state taxation only as congress permits. Des Moines National Bank *v.* Fairweather, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, and cases cited. A tax beyond that permission is void. Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850.

The congressional permission is in Section 5219. As the first of the "following conditions" referred to in the above quotation therefrom, it declares that "The imposition by any State of any one of the above four forms of taxation

shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."[1] Minnesota did not, in 1937, tax national banks "according to or measured by their net income."[2] Instead, it taxed their shares. 1 Mason Minn. St. 1927, Secs. 2026-1 to 2026-4. Under 3 Mason Minn. St. 1940 Supp. Sec. 2394-5 (a), national and state banks are exempt from operation of the state income tax.

Thus, the question is whether the tax in question is an "other" tax on the "shares of national banking associations." Plaintiff's contention is that "because Minnesota cannot impose a tax on dividends paid by national banks it cannot impose a tax on dividends paid by First Bank Stock Corporation out of national bank dividends." That, in sum, is the case of plaintiff. We deny it for these reasons.

The dividends in question are not those of national banks. They are those of a holding company owning and controlling a large system of banks, state and national. It does not hold the stock of the subsidiary banks for investment in the ordinary sense. Characterize it as one may, the First Bank Stock Corporation is an entity distinct from that of the banks or any of them which it controls and manages. State *v.* First Bank Stock Corp., 197 Minn. 544, 267 N. W. 519, 269 N. W. 37, affirmed, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228. Whatever may be its history or current practice, such a holding company is designed to reap advantages of profit and economic power not to be anticipated, or at least not so easily obtained, if its subsidiary banks remained independent of it and of each other.

Dividends received by First Bank Stock Corporation, from whatever source, go into its cash on hand, which is a locally owned and locally managed fund. It may be reinvested in any manner within the corporate powers of the owner. It is therefore the subject of an economic unit wholly distinguishable from that of the subsidiary banks,

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[1] Where a state taxes the income of individuals and also taxes national banking associations "according to or measured by their net income," subdivision (c) permits, on certain conditions, the inclusion in individual income of dividends received from national banks.

[2] By Laws 1941, c. 18, Minnesota elected to tax national banks "according to or measured by their net income" under method (4) specified in Sec. 5219.

the dividends of which come to it. In short, the First Bank Stock Corporation is a complete "non-conductor" of the qualified immunity from state taxation enjoyed by national banks. See Van Allen *v.* The Assessors, 3 Wall. 573, 18 L. Ed. 229.

Our conclusion is supported by Des Moines National Bank *v.* Fairweather, 263 U. S. 103, 44 S. Ct. 23, 26, 68 L. Ed. 191. There a state tax on national bank shares was sustained against a contention that, in computing their value, the bank's investments in tax-exempt United States securities and stock in a federal reserve bank were wrongly included in the assets of the bank. Rejecting that contention, the court said that it "confuses the shares, which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the states may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consist largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares—the one belonging to the corporation as an artificial entity and the other to the stockholders."

In like manner, plaintiff's contentions confuse his income from the shares of First Bank Stock Corporation with the latter's income from the dividends of national banks.

Appellant stresses Bank of California *v.* Richardson, 248 U. S. 476, 39 S. Ct. 165, 63 L. Ed. 372, and two cases following it. Schuylkill Trust Co. *v.* Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91; Schuylkill Trust Co. *v.* Pennsylvania, 302 U. S. 506, 58 S. Ct. 295, 82 L. Ed. 392. In the Bank of California case, the bank owned shares in D. O. Mills National Bank. California, in levying an ad valorem tax on the shares of national banks, assessed the Bank of California as owner of the D. O. Mills shares. It was held that in computing the value of the shares of the Bank of California, in taxing the owners thereof, the value of the D. O. Mills shares could not be validly included.

On the facts before it, the court rejected the non-conductor idea, saying (248 U. S. 476, 39 S. Ct. 167, 63 L. Ed. 372):

"It is undoubted that the statute (Sec. 5219) from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided."

The tax was held to violate "the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority." Considered objectionable was the "double burden resulting from the taxation of the same value twice." Of this "value" (that of the shares of the national bank) the corporation, Bank of California, was not a non-conductor.[3] The result ran counter to "an implicit restriction in the congressional assent" found in Sec. 5219. Des Moines National Bank *v.* Fairweather, 263 U. S. 103, 44 S. Ct. 23, 27, 68 L. Ed. 191.

Neither the Bank of California nor those following it are decisive. The reason lies in the differing nature and economic incidence of the taxes imposed. Perhaps the assets of a corporation may be so reflected in the value of its shares as to be considered taxed when the shares are taxed. But here, when dividends of national banks become earnings of this local corporation, they lose their character as national bank dividends. They are converted into working capital of a private enterprise, the use of which is subject only to restrictions of local law and the corporate powers of the local owner.

Further, the basis principles governing construction of Sec. 5219 and controlling decision in the California case (and those following it) are rooted in the implied reciprocal immunity of the agencies of state and federal governments from taxation by the other. The trend of decision is re-

[3] Professor Rottschaefer says this case achieved a "curious and doubtful result" based on reasoning "most turgid." 7 Minn. L. Rev. 375.

stricting that immunity. In Graves *v.* New York, 306 U. S. 466, 59 S. Ct. 595, 600, 83 L. Ed. 927; 120 A. L. R. 1466, it was said that it should be "narrowly restricted" because, as is the case here, "the expansion of the immunity of the one government correspondingly curtails the soverign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." In the same decision, Mr. Justice Butler, dissenting, predicted that "presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired."

Important is the recognition by Sec. 5219 of the difference between property and income taxes. That section, as amended since the Bank of California case,[4] does not nullify that decision. But where a state taxes national banks "according to or measured by their net income," subdivision (c) permits a nondiscriminatory income tax upon the recipient of dividends from national bank shares.[5] For income taxation, the bank and its shareholders are treated by congress as distinct entities.

Furthermore, we cannot believe that congress, if it constitutionally could do so, intended to extend the implied restrictions of Sec. 5219 to such a tax as that now challenged. As stated in Tradesmens Nat. Bank *v.* Oklahoma Tax Comm., 309 U. S. 560, 60 S. Ct. 688, 692, 84 L. Ed. 947, one of the most recent pronouncements on the problem: "A consideration of the course of judicial decision on Rev. S. Sec. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against

---

[4] Section 5219, at the time of decision of the Bank of California case, permitted only a tax on the shares of national banks as personal property of the owner. Principal restriction on such tax was that it be non-discriminatory, i.e. "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

[5] See footnote 1.

national banking associations or their shareholders as a class."[6]

Our state income tax is non-discriminatory. There is not, and could not be, claim to the contrary.

The exemptions of Sec. 5219 are rooted in the implied, reciprocal immunity of agencies of one government from taxation by the other. Section 5219, having no express provisions as to the income here in question, exemption, if any, must rest on implication. In such case, "it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Graves *v.* New York, 306 U. S. 466, 59 S. Ct. 595, 598, 83 L. Ed. 927, 120 A. L. R. 1466.

In the effect of this state income tax on plaintiff, in respect to his First Bank Stock Corporation dividends, there is no burden upon the federal government or its instrumentality, the national bank. It is not a tax on the property of any bank or its shares. Nor is it payable out of bank funds. It is a tax in personam on an individual computed on his income. Mason Minn. St. 1940 Supp. Secs. 2394-3 and 2394-48. It does not apply in rem against his income or the source thereof. Long gone is the time when a tax upon income must be considered, legally or economically a tax on its source. See Graves *v.* New York, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A. L. R. 1466, and cases cited.

As said in Helvering *v.* Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 976, 82 L. Ed. 1427, the imposition of an income tax on the direct recipient of government funds imposes a "burden" on government only "to some extent which economists are not able to measure." This burden results from the theoretical disadvantage of the governmental instrumentality having to pay a higher price for the services rendered by the taxed individual, whether they be personal services

[6] Section 5219 was materially amended in 1926. 44 Stat. 223, 12 U. S. C. A., Sec. 548. As unamended, its obvious purpose was to prevent discrimination. See footnote 4. From this statement of the court, it appears that existence or non-existence of discrimination remains as the principal inquiry in considering a tax such as the one here in question.

or financial, as here. But, the only substantial and measurable burden is absorbed by the taxpayer. Willcuts *v.* Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.

Such negligible burden as may result is but the inescapable incident of the operation in the same domain of two governments, each possessed of the taxing power. In considering the constitutionality of such burden, it must be weighed against the obvious and now recognized obligation of all persons, even the officers and employes of both governments, to share in the necessary burdens imposed by both through taxation. Helvering *v.* Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427; Graves *v.* New York, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A. L. R. 1466. The recipient of dividends from a holding company, which are derived in part from dividends of national banks, is, too plainly for debate, in no more fortunate position of immunity from income taxation than the officers and employes of state and national governments.

Affirmed.

STONE, *J.*

(6173)

FILE COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1941

No. 596

H. H. IRVINE,

Appellant,

vs.

G. HOWARD SPARTH, COMMISSIONER OF TAXATION OF MINNESOTA,

Appellee.

BRIEF OF APPELLANT OPPOSING THE MOTIONS OF APPELLEE TO DISMISS THE APPEAL IN THE ABOVE ACTION OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT FROM WHICH SUCH APPEAL WAS TAKEN

LELAND W. SCOTT,
Attorney for Appellant,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Of Counsel
FLETCHER, DORSEY, BARKER, COLMAN & BARNEY,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Harrison Brief Co., 501-3 Fourth Ave. So., Minneapolis

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 596

H. H. IRVINE,

Appellant,

vs.

G. HOWARD SPAETH, COMMISSIONER OF TAXATION OF MINNESOTA,

Appellee.

BRIEF OF APPELLANT OPPOSING THE MOTIONS OF APPELLEE TO DISMISS THE APPEAL IN THE ABOVE ACTION OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT FROM WHICH SUCH APPEAL WAS TAKEN

The appeal in the above entitled cause to this Court is from a judgment entered in the Supreme Court of the State of Minnesota in said action in favor of the appellee and against the appellant. That Court rendered an opinion in said case on June 20, 1941, which is reported in ... Minn. ..., 299 N. W. Rep. 204.

STATEMENT OF THE CASE

The issue presented by this appeal is whether, in view of Revised Statutes of the United States, Section 5219, as amended (12 U. S. C. A., Section 548), Minnesota may subject to its income tax* dividends received by appellant on

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*Section 2394, Mason's Minnesota Statutes, 1938 Supplement, and more particularly Sections 2394-3 (b), 2394-10, 2394-11, 2394-12 (f) and (g), 2394-21 (a), 2394-22, 2394-23 (b), and 2394-48.

shares of First Bank Stock Corporation owned by appellant which were paid out of dividends on shares of national banks owned by First Bank Stock Corporation, which national bank shares have been taxed ad valorem.

APPELLANT'S POSITION

Appellant contends that the taxation of the portion of dividends received by appellant on his shares in First Bank Stock Corporation paid from dividends received by First Bank Stock Corporation on shares of national banking associations owned by First Bank Stock Corporation violates R. S. 5219, since such taxation has the effect under R. S. 5219 and decisions of this Court of imposing a Congressionally forbidden tax, in that the subjection of such dividends to an income tax is in effect subjecting national bank dividends to an income tax in violation of the immunity granted to such dividends where the shares of the national banks paying the dividends have been taxed ad valorem, and in that Minnesota thereby gets two taxes from the shareholder, where but one is permitted.

STATEMENT OF FACTS

First Bank Stock Corporation is a Delaware corporation licensed and doing business in Minnesota. It owned a majority of the shares of national and state banks situated in Minnesota, North Dakota, South Dakota, and Montana. Such shares were subjected to tax under the first method permitted by R. S. 5219 by the States in which the national banks issuing such shares were situated. Most of First Bank Stock Corporation's income constituted dividends on shares of national banking associations owned by it. Appellant, a Minnesota resident, was, during 1937, the owner of shares of First Bank Stock Corporation. He received two dividends

on his shares in First Bank Stock Corporation during 1937, and such dividends were 92.35% and 87.34%, respectively, paid out of dividends received by First Bank Stock Corporation from national banks. All of appellant's 1937 dividends received from First Bank Stock Corporation were subjected to tax under Minnesota income tax law. Appellant, claiming that so much of such dividends as were paid out of national bank dividends were not subject to Minnesota income tax because of R. S. 5219, duly claimed refund of so much of his Minnesota income tax liability paid by him for the year 1937 as was based on that part of his First Bank Stock Corporation dividends paid out of national bank dividends, and duly brought suit in the District Court of Ramsey County, Minnesota, for the recovery of such tax. Judgment in that action was against appellant and in favor of appellee, and on appeal to the Supreme Court of Minnesota the judgment was affirmed.

ARGUMENT

The Supreme Court of the State of Minnesota approved the judgment of the trial Court and held that the Minnesota income tax law, construed to impose a tax on the full amount of the dividends so received by appellant, did not violate R. S. 5219, saying, ... Minn. ..., 299 N. W. Rep. 204, 205:

> "Plaintiff's case is based on R. S. Section 5219, as amended, 12 U. S. C. A. Section 548, which in part reads: 'The several States may (1) tax said shares (of national banking associations), or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:'
>
> "(1) As federal instrumentalities, national banks are subject to no inherent power in the states to tax them. The banks, their property, and shares of their capital stock are subject to state taxation only as con-

gress permits. *Des Moines National Bank vs. Fairweather,* 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, and cases cited. A tax beyond that permission is void. *Owensboro National Bank vs. Owensboro,* 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850.

"The congressional permission is in Section 5219. As the first of the 'following conditions' referred to in the above quotation therefrom, it declares that 'The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.' Minnesota did not, in 1937, tax national banks 'according to or measured by their net income.' Instead, it taxed their shares. 1 *Mason Minn. St. 1927,* Sections 2026-1 to 2026-4. Under 3 *Mason Minn. St. 1940 Supp.,* Section 2394-5 (a), national and state banks are exempt from operation of the state income tax.

"Thus, the question is whether the tax in question is an 'other' tax on the 'shares of national banking associations.' Plaintiff's contention is that 'because Minnesota cannot impose a tax on dividends paid by national banks it cannot impose a tax on dividends paid by First Bank Stock Corporation out of national bank dividends.' That, in sum, is the case for plaintiff. We deny it for these reasons."

Since there is here called in question the validity of a state law which it is claimed is repugnant to the laws of the United States, viz., R. S. 5219, and since the state law was held valid after the conclusion by the Supreme Court of the State of Minnesota that the manner of state taxation of national banks and their shareholders must accord with R. S. 5219, it is submitted that it is clear that the Federal question as to the validity of the Minnesota income tax law as applied to the taxation of appellant's dividends received from First Bank Stock Corporation, as tested by R. S. 5219, was necessarily involved and decided and that this Court has jurisdiction. *Colorado Bank vs. Bedford,* 310 U. S. 41; *First Bank Stock Corporation vs. Minnesota,* 301 U. S. 234; *First Na-*

tional Bank vs. Anderson, 269 U. S. 341; and *Dickinson vs. Stiles,* 246 U. S. 631.

Appellant respectfully submits that the opinion of the Supreme Court of the State of Minnesota shows beyond a doubt that this appeal involves a substantial question of Federal law. The following is a brief summary of appellant's contentions, respectfully submitted in support of his claim that the question involved is substantial.

This Court has repeatedly decided and in many cases assumed that the right to tax the shareholders of national banks in respect of their shares, and it follows, appellant contends, in respect of dividends, arises solely from the Congressional permission contained in R. S. 5219. *Van Allen vs. The Assessors,* 3 Wall. 573; *Farmers and Mechanics National Bank vs. Dearing,* 91 U. S. 29; *People vs. Weaver,* 100 U. S. 539, 543; *Talbot vs. Silver Bow County,* 139 U. S. 438; *Owensboro National Bank vs. Owensboro,* 173 U. S. 664; *Home Savings Bank vs. City of Des Moines,* 205 U. S. 503; *Bank of California vs. Richardson,* 248 U. S. 476; *Des Moines National Bank vs. Fairweather,* 263 U. S. 103; *First National Bank of Guthrie Center vs. Anderson,* 269 U. S. 341; and *Colorado Bank vs. Bedford, supra.*

This Court has decided that Congress has the power to grant immunity from state taxation to national banks and the shareholders of national banks; that, when such immunity has been granted, it is immaterial whether or not the tax sought to be imposed is a burden on the national banking association involved; that, since Congress has the power to create national banks, it follows therefrom that it has the power to grant such immunities as are expressed in and to be implied from R. S. 5219; and that the statute granting immunity is binding on this Court. *Pitman vs. Home Owners Loan Corporation,* 308 U. S. 21; *Des Moines National Bank vs. Fairweather,* 263 U. S. 103, 106. See also *Smith*

vs. Kansas City Title Company, 255 U. S. 180, 211, 212; *Lawrence vs. Shaw,* 300 U. S. 245.

The Congress has legislated on the subject of the taxation of shareholders of national banking associations, R. S. 5219. It has, in so far as material to the question presented by this appeal, permitted Minnesota to tax the shares or the dividends of national banking associations. It has thereby consented to the imposition of one tax by the states on such shares or dividends, and has expressly prohibited the taxation of both. The subjection by a state of the value represented by the shares to another tax is expressly prohibited by R. S. 5219 as construed by this Court. This is so even though the subject of state taxation is shares of the corporate holder of shares of national banking associations. *Bank of California vs. Richardson,* 248 U. S. 476, 483; *Schuylkill Trust Company vs. Pennsylvania,* 296 U. S. 113; *Schuylkill Trust Company vs. Pennsylvania,* 302 U. S. 506. It can make no difference that the tax here claimed to be repugnant to R. S. 5219 is one imposed on dividends of a corporate holder of national banking association shares and paid out of dividends received on such shares because the reasoning and the holding of the cited cases establishes that R. S. 5219 means that one tax, and only one tax, may be imposed on the shareholders of national banking associations, and that, for the purpose of giving effect to the Congressionally granted immunity, the shareholders of a corporate holder of shares of national banking associations are regarded as national banking association shareholders. Since *Bank of California vs. Richardson, supra,* was decided in 1919 and since the Congress amended R. S. 5219 thereafter and in 1923 and 1926 (Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223), it can be fairly said that the Congress has approved this Court's construction of Section 5219. Since it is settled law that shares of a corporate holder of shares of national bank-

ing associations cannot be subjected to tax to the extent that the value of such shares includes the value of the shares of national banking associations, it is clear that the dividends of the corporate holder of national banking associations cannot be taxed to the extent that they included dividends of national banks, if such dividends had been taxed to such corporate holder. Since the two methods of taxation have been expressly made mutually exclusive, it is respectfully submitted that, where as here a state has elected the first method, viz., the method which permits the taxation of shares and has imposed a tax thereunder, it cannot thereafter tax, either directly or indirectly, the dividends of the national banking associations, the shares of which have been taxed. The effect of the decision of the Supreme Court of Minnesota is, on the one hand, to require Minnesota to look to R. S. 5219 for authority to tax the shareholders of national banks and permit Minnesota to ignore R. S. 5219 for the purpose of imposing an additional tax prohibited by that section.

Tradesmen's National Bank vs. Oklahoma Tax Commission, 309 U. S. 560, is not to the contrary. It involved the validity of a state tax which was imposed under the fourth method permitted by R. S. 5219. This Court's statement, so heavily relied on by appellee, that "The various restrictions it (Revised Statutes of the United States, Section 5219) places on the *permitted methods* of taxation are designed to prohibit only those systems of state taxation which in practical operation discriminate against national banking associations or their shareholders as a class" clearly deals only with restrictions placed on the permitted methods, since the entire controversy was concerned with claimed violation by the state law of the restrictions upon the fourth permitted method. This Court had no occasion to and did not consider the restriction contained in R. S. 5219 upon the simultaneous imposition by a state of taxes under two of the permitted

methods, as Minnesota claims the right to do in this case.

Des Moines National Bank vs. Fairweather, supra, cited by the Supreme Court of Minnesota as supporting its conclusion that Minnesota has the right to tax appellant's dividend income, does not, appellant respectfully submits, deal at all with the question presented in his case. There the right of Iowa to tax a national bank's shares and to include in the value of such shares the value of the bank's investments in tax exempt United States securities and stock in a Federal Reserve Bank was upheld. Appellant contends that the case was not one which involved an immunity Congressionally established, for it has not been found that the Congress prohibited inclusion in the value of national banks shares of such investments. It is respectfully submitted that no prohibition similar to that contained in R. S. 5219 was involved in that case.

For the foregoing reasons appellant respectfully submits that the question presented by this appeal is substantial, and that this Court should deny appellee's motion to dismiss the appeal or, in the alternative, to affirm the decision of the Supreme Court of the State of Minnesota.

Dated September 10, 1941.

Respectfully submitted,

LELAND W. SCOTT,
Attorney for Appellant,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Of Counsel
FLETCHER, DORSEY, BARKER, COLMAN & BARBER,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 596

H. H. IRVINE,

Appellant,

vs.

G. HOWARD SPAETH, COMMISSIONER OF TAXATION OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. A. A. BURNQUIST,
Attorney General of Minnesota,
P. F. SHERMAN,
Assistant Attorney General of Minnesota,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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No. 596

H. H. IRVINE,

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G. HOWARD SPAETH, COMMISSIONER OF TAXATION OF MINNESOTA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now comes G. Howard Spaeth, Commissioner of Taxation of Minnesota, the appellee herein, and for his statement in opposition to appellant's statement as to jurisdiction of the Supreme Court of the United States, and in support of appellee's motion to dismiss or affirm respectfully shows:

I. Statement of Issue on Appeal.

The sole question sought to be presented in this appeal is the claim by appellant that the State of Minnesota, having imposed a property tax on shares of national banks, cannot impose a tax on the income received by an individual in the

form of dividends paid to him by First Bank Stock Corporation to the extent that those dividends passed on to him the income from national bank dividends which was received by the First Bank Stock Corporation as the owner of national bank shares. This claim of the appellant the appellee denies, and the State Supreme Court, in the opinion and judgment here challenged, determined the question and all others presented by the appellant adversely to him.

II. Summary Statement of Facts.

In 1937 the plaintiff received dividends on stock held by him in First Bank Stock Corporation, which in turn is the owner and holder of shares in State and national banks. He included in his State income tax return the full amount of these dividends, but thereafter filed a claim for refund of that part of the tax which was based upon that portion of the dividends which the plaintiff claims were paid out of dividends received by the First Bank Stock Corporation from national banks. The claim for refund was denied, and the appellant brought an action for the recovery of the amount claimed. The judgment of the trial court, and of the Supreme Court of Minnesota, went against him.

The material portions of the Minnesota State Income Tax Law, which imposes the tax here in question, are as follows: References are made to Mason's Statutes, 1938 Supplement.

> "2394-2—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers: * * *
>
> (b) Resident and nonresident individuals. * * *"
>
> "2394-10.—The term 'gross income' shall include every kind of compensation for labor or personal serv-

ices of every kind from any private or public employment, office, position or services, whatsoever; income derived from the ownership or use of property; gains or profits derived from every kind of disposition of, or every kind of dealings in, property; income derived from the transaction of any trade or business; and income derived from any source whatever. Items of gross income includible within said definitions shall be deemed such regardless of the form in which received. * * * "

III. There is No Substantial Federal Question.

The Federal question which appellant invokes to sustain the jurisdiction of the United States Supreme Court is that the Minnesota State Income Tax, insofar as it is measured by that portion of the dividends received from First Bank Stock Corporation which he claims is traceable to dividends paid by national banks, is in violation of R. S. Sec. 5219 (12 U. S. C. A. 548).

It is respectfully submitted that the Federal question presented is not substantial and is not sufficient to properly invoke the jurisdiction of this Court.

Zucht v. *King*, 260 U. S. 174, 43 S. Ct. 24.

It is settled, by a recent decision of this Court, that R. S. 5219 prohibits only taxes which are discriminatory. In *Tradesman's National Bank* v. *Oklahoma Tax Commission*, 309 U. S. 560, 60 S. Ct. 688, 84 L. Ed. 947, the purpose and effect of R. S. Sec. 5219 is stated as follows:

> "A consideration of the course of judicial decision on R. S. Sec. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of State taxation which discriminate in practical operation against national banking associations or their shareholders as a class."

Appellant does not claim, and cannot claim, that the Minsota Income Tax Law is discriminatory in practical operation against national banking associations or their shareholders as a class.

The tax in question is not imposed upon national banks, nor upon the owner and holders of shares in national banks.

The First Bank Stock Corporation is a corporation which among other activities is engaged in the business of holding the shares of, and managing, national and State banks. See *State* v. *First Bank Stock Corporation,* 197 Minn. 544, 267 N. W. 519, 269 N. W. 37, affirmed in 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061. The corporation is a "nonconductor" of any immunity that may attach to dividends paid by national banks.

Van Allen v. *The Assessors,* 3 Wall. 573, 18 L. Ed. 229; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191.

In the cases relied on by appellant (*Bank of California* v. *Richardson,* 248 U. S. 476, 483; *Schuylkill Trust Company* v. *Pennsylvania,* 296 U. S. 113; *Schuylkill Trust Company* v. *Pennsylvania,* 302 U. S. 506), the taxes held invalid were property taxes, measured by the value of national bank shares which had already been included in the measure of another property tax, and the taxes in question were payable by, and from the assets of, an owner and holder of national bank shares. The tax questioned here is imposed upon the income of an individual and is in no way a burden upon, or payable by, or from the assets of, the First Bank Stock Corporation.

Upon the record and the authorities above cited, the appellee submits that there is no substantial Federal question here presented to properly invoke the jurisdiction of this Court.

Appellee therefore moves this Honorable Court to affirm the decision below or to dismiss the appeal for want of a properly presented, substantial, Federal question.

Respectfully submitted,

J. A. A. BURNQUIST,
Attorney General,
P. F. SHERMAN,
Assistant Attorney General,
102 *State Capitol, St. Paul,*
Minnesota,
Attorneys for Appellee.

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No. 596. IRVINE *v.* SPAETH, COMMISSIONER OF TAXATION. Appeal from the Supreme Court of Minnesota. October 13, 1941. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Mr. Leland W. Scott* for appellant. *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, for appellee. Reported below: 210 Minn. 489, 299 N. W. 204.